

E-filed: 2/3/2009IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION11 HYNIX SEMICONDUCTOR INC., HYNIX  
12 SEMICONDUCTOR AMERICA INC.,  
13 HYNIX SEMICONDUCTOR U.K. LTD., and  
14 HYNIX SEMICONDUCTOR  
DEUTSCHLAND GmbH,

Plaintiffs,

15 v.  
16 RAMBUS INC.,

Defendant.

No. C-00-20905 RMW

ORDER DENYING HYNIX'S MOTION FOR  
SUMMARY JUDGMENT OF UNCLEAN  
HANDS

[Re Docket No. 3879]

19 Rambus has accused Hynix<sup>1</sup> of infringing various patents. In response, Hynix asserted the  
20 defense of unenforceability alleging that Rambus has unclean hands resulting from its destruction of  
21 documents in the late 1990's. The court held a bench trial on Hynix's unclean hands defense and  
22 ruled in Rambus's favor. *Hynix Semiconductor Inc. v. Rambus, Inc.*, — F. Supp. 2d —, 2006 WL  
23 565893 (N.D. Cal. Jan. 5, 2006). Since then, the district court in Delaware held a bench trial with  
24 respect to an essentially identical claim by Micron that Rambus spoliated evidence. The Delaware  
25 court concluded that Rambus's patents were unenforceable against Micron. *Micron Tech., Inc. v.*  
26 *Rambus Inc.*, — F.R.D. —, 2009 WL 54887 (D. Del. Jan. 9, 2009).

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The court collectively refers to all of the Hynix entities as "Hynix."

1           Invoking the doctrine of issue preclusion, Hynix moves for summary judgment of  
 2 unenforceability based upon the *Micron* decision, which is later in time than this court's decision  
 3 rejecting the defense. In the alternative, Hynix seeks reconsideration of the court's unclean hands  
 4 decision and other relief. The bottom line is that Hynix wants to substitute the favorable decision in  
 5 *Micron* for the unfavorable decision it received here. Rambus opposes the motion. The court has  
 6 reviewed the papers and considered the arguments of counsel.<sup>2</sup> For the following reasons, the court  
 7 denies Hynix's motion.

## 8           **I. ISSUE PRECLUSION**

### 9           **A.     Equitable Discretion**

10          Non-mutual issue preclusion is a "distinctively risky" doctrine. 18 Wright & Miller § 4416,  
 11 at 402 (2d ed. 2002). Its "[w]ise administration requires a delicate balance between broad  
 12 generalities that too frequently permit unfair preclusion and searching scrutiny that costs more than  
 13 can be gained by whatever unblemished preclusion survives." 18A Wright & Miller § 4465, at 730  
 14 (2d ed. 2002). Thus, the Supreme Court observed that, "no one set of facts, no one collection of  
 15 words or phrases, will provide an automatic formula for proper rulings on estoppel pleas."  
 16 *Blonder-Tongue Labs., Inc. v. Univ. of Illinois*, 402 U.S. 313, 333-34 (1971). "In the end, decision  
 17 will necessarily rest on the trial courts' sense of justice and equity." *Id.* at 334. Here, it is difficult to  
 18 see how it would be just or equitable to give Hynix the benefit of a decision between Rambus and a  
 19 third party when Hynix fully litigated the issue with Rambus and lost.

20          Despite these admonitions, litigants and the courts all too frequently reduce this rigorous  
 21 inquiry to a collection of labels. Here, Hynix urges that the court only possesses discretion  
 22 regarding the application of non-mutual issue preclusion in "offensive" situations, and that in  
 23 "defensive" contexts, the court has *no* discretion regarding the application of issue preclusion. The  
 24 Supreme Court's jurisprudence rejects the blanket application of preclusion principles urged by  
 25 Hynix. "[T]here is no intrinsic difference between 'offensive' as distinct from 'defensive' issue

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27           <sup>2</sup>       The court notes that of the four Manufacturers and Rambus' briefs addressing the issues  
 28 raised by the Delaware court's opinion, Hynix's were particularly helpful to the court in grappling with  
 the issues thanks to Hynix's concrete suggestions for how to proceed.

1 preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be  
2 required in the former situation than the latter." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322,  
3 331 fn.16 (1979) (quoting the Restatement (Second) of Judgments § 88, Reporter's Note). Indeed,  
4 the first endorsement by the Supreme Court of non-mutual issue preclusion related to the  
5 "defensive" use of a prior judgment that a patent was invalid. *Blonder-Tongue*, 402 U.S. at 334.  
6 Yet the Court, as quoted above, emphasized the need for careful, equitable application of the  
7 doctrine. *See id.* at 333-34.

8 Hynix cites various cases for the principle that this court lacks discretion in the application of  
9 non-mutual issue preclusion in the "defensive" context. The first, *Blonder-Tongue*, does not support  
10 this proposition, as shown above. In the second, *Liberty Mutual Insurance Co. v. FAG Bearings*  
11 *Corp.*, the Eighth Circuit described *Parklane Hosiery* in a parenthetical as "adopting a test of  
12 discretion with respect to nonmutual offensive collateral estoppel only." 335 F.3d 752, 757 (8th Cir.  
13 2003). As shown above, this characterization is questionable. Nonetheless, the Eighth Circuit's  
14 ensuing discussion of issue preclusion doctrine was correct: "Because mutuality is not lacking in this  
15 case, the equitable considerations requiring deference to the district court's evaluation of the overall  
16 fairness to the litigants in a nonmutual case are not present." *Id.* at 757-58. *Liberty Mutual* thus  
17 neatly recognizes the Supreme Court's discussion of the need for careful, equitable consideration  
18 when applying non-mutual issue preclusion. Hynix also relies on a case from the Third Circuit  
19 electing to review *de novo* a trial court's decision regarding the application of "defensive" issue  
20 preclusion. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006).  
21 This authority is not binding on this court, and not persuasive for the reasons discussed.

22 Furthermore, this case provides a good illustration of the folly of labeling the use of issue  
23 preclusion as "defensive" or "offensive." The terms do not capture the fluidity of a party's identity  
24 created by the ability to seek a declaratory judgment. While Rambus has lost on Micron's unclean  
25 hands defense to Rambus's infringement claims, Rambus was forced to litigate as a counter-claimant  
26 when Micron sued it for a declaratory judgment in Delaware. Thus, while Rambus brought an  
27 infringement claim against Micron, it did not choose the time, venue, or adversary. The unfairness  
28 of being precluded based on a trial that a party did not choose animates substantial concern about the

1 application of non-mutual issue preclusion and the need for a trial court to exercise discretion. *See*  
2 *generally* 18A Wright & Miller § 4465.1 (2d ed. 2002) ("One of the most general concerns attending  
3 the abandonment of mutuality has been that it may be unfair to bind a party who did not take the  
4 initiative in the first action."). Those concerns and the need for discretion apply equally here, even  
5 though Hynix's preclusion argument is properly termed "defensive." *Idaho Potato Commission v. G*  
6 & T Terminal Packaging, Inc.

7 , 425 F.3d 708, 713 fn.3 (9th Cir. 2005) (defining "defensive" non-  
8 mutual issue preclusion as "a defendant['s] attempt[] to preclude a plaintiff from relitigating an issue  
that the plaintiff previously litigated unsuccessfully against a different party").

9 In reply, Hynix argues that *Stevenson v. Sears, Roebuck & Co.* precludes this court's  
10 discretion to apply the non-mutual issue preclusion doctrine. The court disagrees. In *Stevenson*, the  
11 Federal Circuit explained that inconsistent judgments as to validity should not *prevent* a court from  
12 applying non-mutual issue preclusion to stop a patentee's infringement case. 713 F.2d 705, 709-10  
13 (Fed. Cir. 1983). Moreover, the court explained that the third court should not attempt to discern  
14 which prior court was "correct," in large part because such an inquiry would often fail given the  
15 potential for different arguments and allegedly invalidating prior art references. *Id.* Instead, the  
16 third court should stick to applying *Blonder-Tongue*'s searching "full and fair opportunity to litigate"  
17 inquiry. *Id.* at 709. But as explained above, this inquiry is not an "automatic formula." *Id.*  
18 Conflicting invalidity decisions should not lead the third court to reflexively enter judgment of  
19 invalidity. *Id.* at 710. On the contrary, such inconsistent outcomes form a "red flag warning" to the  
20 trial court to be especially careful when applying the doctrine of non-mutual issue preclusion. *Id.*  
21 As the Supreme Court has made clear repeatedly, the application of non-mutual issue preclusion  
22 requires a careful weighing of the equities. The court therefore turns to examine the myriad factors  
23 that influence its exercise of discretion.

#### 24       **B.     Inconsistent Outcomes**

25       "The existence of inconsistent prior judgments is perhaps the single most easily identified  
26 factor that suggests strongly that neither should be given preclusive effect." 18A Wright & Miller §  
27 4465.2, at 764 (2d ed. 2002); Rest. 2d Judgments § 29(4). The Delaware court's decision on  
28 spoliation differs from this court's as to both factual and legal conclusions. For example, the

1 Delaware court determined that Rambus anticipated litigation, and thus possessed a duty to preserve  
2 evidence, "no later than December 1998" based on Joel Karp's "nuclear winter" memorandum.  
3 *Micron*, 2009 WL 54887 ¶ 55. On similar evidence, this court concluded that Rambus did not  
4 anticipate litigation until Rambus actually sought out and retained litigation counsel in late 1999.  
5 *Hynix*, 2006 WL 565893, \*24. As an example of the latter, the Delaware court concluded that  
6 Micron's ability to defend against Rambus's claim had been prejudiced because "the record  
7 demonstrates that there were documents relevant to [Micron's JEDEC claims and inequitable  
8 conduct defense]" that had been destroyed. *Micron*, 2009 WL 54887 ¶ 56. Considering the same  
9 issue, this court concluded otherwise:

10 Although Hynix has made a showing that Rambus destroyed some relevant  
11 documents, Rambus established that adequate similar and material documents or  
12 classes of documents were not destroyed. The evidence showed that Rambus has  
13 produced to Hynix a large volume of relevant and material documents. According  
14 to the testimony of Hynix's counsel, Rambus has produced approximately 1.2 million  
15 pages of documents responsive to Hynix's discovery requests in this case. Moreover,  
16 for each category of documents material to the validity or enforceability of Rambus's  
17 patents that Hynix argued Rambus did not preserve and produce, Rambus has shown  
18 by clear and convincing evidence that documents in that category were in fact  
19 produced. Although Hynix complained that a notebook, models, and detailed  
20 diagrams authored by Dr. Farmwald that Farmwald himself described as being from  
21 early to mid-1988 in a September 1995-mail to Crisp were never produced, Rambus  
22 has produced various documents relating to the conception and reduction to practice  
23 of the patented inventions prior to the April 1990 filing date of the '898 application.  
24 These include inventor notes, computer simulations, drafts of patent applications,  
25 technical presentations given by the inventors, and several boxes of documents that  
had been in Farmwald's possession (and thus not subjected to Rambus's enforcement  
of its Document Retention Policy). Rambus also produced several boxes of prior art.  
The prior art produced by Rambus included prior art references with fax lines  
showing that the art was ordered in 1996, prior art references with a few underlines,  
and prior art references containing a few notations. No evidence suggested that  
material, non-cumulative prior art exists that Rambus has not produced. Thus, it  
does not appear that Hynix has been deprived of material, non-privileged, and  
non-cumulative documents.

26 Additionally, to the extent that documents such as notes of interviews with the  
27 inventors and draft responses to the patent examiner may have been discarded when  
Attorney Vincent conformed the issued patent files to the PTO file wrapper, those  
28 documents would probably be privileged and not been discoverable. . . . With regard  
to the prior license agreement between Rambus and Hyundai, Hynix acknowledges  
that a "fairly complete record" has been produced[.] . . . The court concludes that  
Hynix has not been prejudiced by the destruction of Rambus documents.

*Hynix*, 2006 WL 565893, \*27-28.

The existence of inconsistent judgments counsels against the application of issue preclusion.

1     See *Parklane Hosiery*, 439 U.S. at 330. The judicious application of issue preclusion rests on an  
2 assumption that a prior decision was more or less correct. *Crawford v. Ranger Ins. Co.*, 653 F.2d  
3 1248, 1252 (9th Cir. 1981). This assumption is not warranted where inconsistent decisions have  
4 been reached; it instead suggests that "'the outcomes may have been based on equally reasonable  
5 resolutions of doubt as to the probative strength of the evidence[.]'" *Id.* (quoting *State Farm Fire &*  
6 *Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1192 (Or. 1976)).

7                 The unfairness of applying non-mutual issue preclusion in the face of conflicting  
8 adjudications is heightened when those issues are "slippery subjective appraisals or application of  
9 generalized standards of conduct." 18A Wright & Miller § 4465.2, at 764; cf. Rest. 2d Judgments §  
10 29(7) (considering whether "[t]he issue is one of law and treating it as conclusively determined  
11 would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon  
12 which it was based"). One of the central issues to the spoliation question in these cases is whether or  
13 not any Manufacturer has suffered prejudice from Rambus's document destruction. This subjective  
14 determination is plainly an issue on which reasonable minds can differ and, to the extent legal issues  
15 are involved, will appropriately require the attention of the Federal Circuit Court of Appeals. But  
16 the issue's "slippery" nature suggests it would be unfair to preclude Rambus from relitigating it.

17                 Hynix argues that a "last in time" rule should apply, citing *Americana Fabrics, Inc. v. L & L*  
18 *Textiles, Inc.*, 754 F.2d 1524, 1530 (9th Cir. 1985). A critical feature of *Americana Fabrics*' "last in  
19 time" discussion is that it involves mutual, not non-mutual, preclusion. See 754 F.2d 1527-28. The  
20 purpose of the rule is to create finality as between two parties, a value lacking in the non-mutual  
21 context. *Id.* at 1530. The "last in time" rule has little basis in non-mutual issue preclusion. It  
22 implicitly hypothesizes the existence of conflicting judgments. But the Supreme Court's discussion  
23 in *Parklane Hosiery* explained that it "may also be unfair to a defendant if the judgment relied upon  
24 as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the  
25 defendant." *Parklane Hosiery*, 439 U.S. at 330 & fn.14. Yet, if the "last-in-time" rule governed in  
26 non-mutual preclusion cases, the concern regarding inconsistent judgments would be moot. Thus,  
27 Hynix's attempt to extend the last-in-time rule to this context fails.

28                 C.     **Hynix's Ability to Have Joined in Micron**

1       A special consideration highlighted in *Parklane Hosiery* supports denial of the application of  
2 issue preclusion as to Hynix. The law of preclusion must not be applied in such a way that it  
3 encourages parties to adopt a "wait and see" attitude, in the hope that the first action by another  
4 plaintiff will result in a favorable judgment." *Parklane Hosiery*, 429 U.S. at 330. Instead, the  
5 doctrine of issue preclusion should be interpreted to create strong incentives to "join all potential  
6 defendants in the first action if possible." *Id.* at 329-30.

7       The Supreme Court's use of "defendants" is an artifact of its failure to discuss the declaratory  
8 judgment context. Ideally, this patent litigation would have proceeded before a single court, as done  
9 when Rambus sued the Hynix, Nanya, and Infineon entities in the 05-00334 case, and then joined  
10 the Samsung entities when Rambus terminated Samsung's patent license.<sup>3</sup> But that is not how this  
11 litigation, broadly conceived, begun. Micron sued Rambus for declaratory judgment on August 28,  
12 2000 in Delaware. Hynix sued Rambus for declaratory judgment the next day here in San Jose,  
13 California. Persuasive circumstantial evidence suggests that Micron and Hynix coordinated their  
14 filing of the declaratory judgment lawsuits. *See* Conduct Trial Tr. 4006:8-4008:12 (Mar. 5, 2008)  
15 (former Hynix employee Farhad Tabrizi admitting to his belief in 2000 prior to litigation with  
16 Rambus that Hynix would litigate "to the end of Rambus company"); 5131:1-25; 5135:1-16 (Mar.  
17 18, 2008) (testimony of Micron CEO Steve Appleton that he met with Hynix personnel in early  
18 August of 2000 and that he cancelled licensing meetings with Rambus to sue for declaratory  
19 judgment); 5633:16-5634:1 (Mar. 20, 2008) (testimony from Hynix employee D.S. Chung about  
20 licensing meetings Hynix scheduled with Rambus, then cancelled by suing for declaratory  
21 judgment); *cf.* Licensing Trial Tr. 420:24-423:6 (Sept. 24, 2008) (testimony of Samsung employee  
22 Jay Shim regarding joint defense agreement between Samsung, Hynix, Micron, and Infineon entered  
23 into in August 2000).

24       Hynix now seeks to take advantage of its coordinated, dual-front litigation against Rambus to  
25 capitalize on Rambus's loss in Delaware. Were the court to now apply issue preclusion in Hynix's  
26 favor, it would be rewarding Hynix's efforts to multiply the scope of this conflict, thus confirming

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28       <sup>3</sup>       Rambus could not join the Micron entities at the time. When it could, Rambus sued the  
Micron entities in the 06-00244 case in this court, and the cases were consolidated when appropriate.

1 the Supreme Court's fear that improper use of non-mutual issue preclusion "will likely increase  
2 rather than decrease the total amount of litigation, since potential plaintiffs will have everything to  
3 gain and nothing to lose by not intervening in the first action." *Parklane Hosiery*, 439 U.S. at 330.  
4 This consideration highlights the inequity of permitting Hynix to invoke the Delaware court's  
5 spoliation order over the order from the venue it chose.

6       **D. Lack of Efficiency**

7       A fundamental purpose of non-mutual issue preclusion is to promote efficiency in the  
8 judicial system. *See generally* 18A Wright & Miller § 4464, at 710-711 (2d ed. 2002); *Blonder-*  
9 *Tongue*, 402 U.S. at 328-29 (listing two justifications for non-mutual issue preclusion as the need for  
10 "efficient judicial administration" and to dispel "the aura of the gaming table"); *cf. SEC v. Monarch*  
11 *Funding Corp.*, 192 F.3d 295, 305-07 (2d Cir. 1999) (reflecting "upon whether the efficiency  
12 rationale for collateral estoppel would be advanced or hindered" if applied to criminal sentencing  
13 decisions). "If the economies achieved by applying collateral estoppel are not readily apparent, why  
14 risk the permanent encapsulation of a wrong result?" *Monarch Funding*, 192 F.3d at 306.

15       The case of *Mozart Co. v. Mercedes-Benz of North America, Inc.* illustrates these concerns.  
16 833 F.2d 1342 (9th Cir. 1987). The case arises from parallel antitrust cases. *Id.* at 1343-44. In the  
17 California case, the plaintiff lost after an 11-week jury trial when the jury found that a business  
18 justification excused the allegedly anticompetitive conduct. *Id.* at 1343. Meanwhile, the same  
19 defendant lost in Maryland when a jury did not find that such a business justification existed. *Id.* at  
20 1347. The Ninth Circuit's holding appears to be that although the cases both involved allegedly  
21 anticompetitive tying, the cases turned on different facts, defeating any potential for issue  
22 preclusion. *See id.* at 1348 (noting that "the case before us is based on different evidentiary facts").  
23 But the court further explained that "[i]t would be a curious use of affirmative collateral estoppel to  
24 permit one who had lost before the jury on certain facts to overturn that verdict by pointing out that  
25 on different facts, but identical legal principles, the winner before the jury had lost a jury verdict to a  
26 stranger on an earlier day and in a different court." *Id.* The court did not further illuminate its  
27 reasoning, but it seems likely that its conclusion stems from the complete absence of efficiency  
28 gained by reversing an existing decision simply because a second, contrary decision now exists.

1       Similarly, in *Gough v. Natural Gas Pipeline Co. of America*, the plaintiff failed to seek non-  
 2 mutual issue preclusion prior to trial. 996 F.2d 763, 768 (5th Cir. 1993). When the jury found the  
 3 plaintiff contributorily negligent, the plaintiff sought to preclude the defendant from asserting the  
 4 defense based on a prior verdict that the defendant had been solely responsible for the accident. *Id.*  
 5 at 768-69. The Fifth Circuit rejected the argument, noting first that the plaintiff might have been  
 6 able to join in the first action. *Id.* at 769. The court further observed that "efficiency is [offensive]  
 7 collateral estoppel's only true justification." *Id.* at 769.<sup>4</sup> Thus, "[i]t is too late to invoke the virtue of  
 8 efficiency when the case has already been tried." *Id.*

9           Hynix has already tried – and lost – the issue of spoliation. Nothing would be gained by  
 10 permitting Hynix to invoke "efficiency" now, particularly when it previously collaborated to defeat  
 11 judicial efficiency.

12           **E. Conclusion**

13           For the foregoing reasons, the court is not persuaded that "justice and equity" will be served  
 14 by permitting Hynix to rely on the Delaware court's opinion finding that Rambus engaged in  
 15 spoliation. Hynix directly litigated the issue with Rambus and lost. The existence of inconsistent  
 16 decisions calls into question the correctness of both of the existing orders. Moreover, Hynix's  
 17 litigation tactics confirm the *Parklane* Court's fears about the potential for abuse of non-mutual issue  
 18 preclusion. Finally, the application of issue preclusion in this context would generate no efficiency  
 19 for the court or the parties.

20           **II. RECONSIDERATION**

21           Hynix argues in the alternative that the court should reconsider its prior decision based on  
 22 the *Micron* decision. Specifically, Hynix urges this court to adopt the Delaware court's conclusion  
 23 that the facts show that Rambus anticipated litigation in September 1998 based on Joel Karp's  
 24 "nuclear winter" memo. Rambus does not argue that reconsideration in this context is inappropriate.  
 25 The court agrees that in this situation "the first court should be free to reconsider, and in deciding

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 27           <sup>4</sup>       The Fifth Circuit added the word "offensive." The law review article it paraphrased did  
 28 not include the word "offensive." *Compare id.* with Jack Ratliff, Offensive Collateral Estoppel and the  
 Option Effect, 67 Texas L.Rev. 63, 101 (1988).

1 whether to reconsider may take account of the advantage of consistent results." 18 Wright & Miller  
2 § 4404, at 79-80 (2d ed. 2002).

3 But the court is not persuaded that its prior opinion is erroneous. The memo was in evidence  
4 (as Hynix Trial Exhibit 4) and subject to substantial testimony. Spoliation Trial Tr. 294:10-309:22  
5 (Oct. 18, 2005). The court discussed the nuclear winter memo in its findings. *See Hynix*, 2006 WL  
6 565893 ¶¶ 53, 54. The court did not specifically discuss the memo in its conclusions of law, *see id.*  
7 at \*22-\*24, but the court gave it careful consideration – and decided that it did not show an intent to  
8 litigate.

9 To begin, the Delaware court described the document as outlining what Mr. Karp believed  
10 Rambus's strategy should be "in the 'very unlikely' event that Intel cancelled its RDRAM production  
11 and moved instead to a competing technology." *Micron*, 2009 WL 54887 ¶ 24. The Delaware  
12 court's description alone suggests the tentative and contingent nature of *Mr. Karp's* thinking, and not  
13 *Rambus's* "anticipation of litigation."

14 The remainder of the document's contents confirms the hesitant, contingent nature of Mr.  
15 Karp's planning. The memo begins with its "major assumption," described as, "Intel decides to  
16 cancel ramp and move away from Rambus to something else (DDR, SDRAM, PC133, or  
17 something else that may be totally new, having been developed in secret by elves in the Black Forest  
18 at a cost of \$10B, for example)." Roeder Decl., Ex. J at HTX 004.002. It is a rare memo that sets  
19 forth a company's policy and anticipated court actions and also begins its first sentence with an off-  
20 the-cuff reference to Black Forest elves. The memo continued: "I need to point out at this time that  
21 this is a very unlikely scenario, even for something that's purely hypothetical." *Id.* Nonetheless, the  
22 memo proceeded to outline a scenario in which Rambus's intellectual property could be used to  
23 persuade Intel to stick with Rambus. *See id.*

24 To the extent the nuclear winter memo discussed suing DRAM makers, it did so in the  
25 context of maneuvering to put pressure on Intel to continue to support Rambus's DRAM designs.  
26 The memo concluded its assessment of suit against a DRAM maker by noting that for such a suit  
27 "costs would be high (\$1.5-3.0M) since we would be fast-tracking everything." *Id.* at HTX 004.006  
28 (emphasis added). "The case could be prepared in 1-3 months." *Id.* (emphasis added). Beside being

1 ironically wrong, these estimates show both the speculative, contingent nature of Mr. Karp's  
 2 planning and the amount of time and effort still needed before litigation would be something that  
 3 Rambus considered "reasonably foreseeable" or "anticipated," i.e., "look[ed] forward to, look[ed] for  
 4 (an uncertain event) as certain." Oxford English Dictionary (2d ed. 1989) (ninth definition of  
 5 "anticipate, v.").)

6 Thus, the court remains unpersuaded that Rambus considered litigation "reasonably  
 7 foreseeable" as of the date of Joel Karp's "nuclear winter" memo.

### 8           **III. HYNIX'S REQUESTED STAY**

9           Hynix also moves for a stay of proceedings in 00-20905 and for the spoliation issue to be  
 10 certified for interlocutory appeal with the *Micron* spoliation order. As described in an  
 11 accompanying order, the court agrees with Hynix that consolidated review of the two conflicting  
 12 spoliation decisions is prudent and that a stay of the 05-00334 action is appropriate. The court does  
 13 not, however, agree that certification and a stay of the 00-20905 case is appropriate. Instead, the  
 14 court aims to resolve the outstanding issues in this case to permit appellate review of a final  
 15 judgment.

16           Hynix's briefs also explore some of the difficult issues looming, like the mechanics for  
 17 posting an adequate appellate bond in light of the battered credit markets. These issues concern the  
 18 court, but they do not provide a basis for not forging ahead. They may be addressed by motion, if  
 19 not resolved by a meet-and-confer between the parties. The court requests that Rambus and Hynix  
 20 meet and confer about the form and content of the final judgment to be entered in the 00-20905  
 21 action and, if unable to agree, to arrange a conference call with the court during the week of  
 22 February 16, 2009.

### 23           **IV. ORDER**

24           For the foregoing reasons, the court denies Hynix's motion.

25  
 26 DATED: 2/3/2009



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 28           RONALD M. WHYTE  
United States District Judge

1 Notice of this document has been electronically sent to counsel in: 00-20905.

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		05-00334	05-02298	06-00244	00-20905
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21  
22 **Dated:** 2/3/2009 TSF  
Chambers of Judge Whyte